(2)

No. 91-673

In The

# Supreme Court of the United States

October Term, 1991

SHERMAN BLOCK, SHERIFF OF LOS ANGELES COUNTY; COUNTY OF LOS ANGELES; LOS ANGELES COUNTY SHERIFF'S DEPARTMENT; JOHN P. KNOX,

*Petitioners,*

v.

SUSAN L. BOUMAN, on behalf of herself and all others similarly situated,

*Respondents.*

**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

DENNIS MICHAEL HARLEY
2 North Lake Avenue, Suite 590
Pasadena, California 91101
(818) 796-7555

*Counsel for Respondents*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTION PRESENTED FOR REVIEW

Do the Petitioners' complaints regarding standing, adverse impact, and retaliation warrant review by this Court on the grant of certiorari?

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW ..... i

TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES ..... iii

RESPONDENTS' BRIEF IN OPPOSITION ..... 1

OPINIONS BELOW ..... 1

SUPPLEMENTAL STATEMENT OF THE CASE ..... 2

REASONS WHY THE PETITION SHOULD BE DENIED ..... 4

SUMMARY OF ARGUMENT ..... 5

STANDING ..... 5

ADVERSE IMPACT ..... 12

RETALIATION ..... 14

CONCLUSION ..... 16

# TABLE OF AUTHORITIES

Page

CASES

*Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564 (1985) ..... 9, 14

*Ang v. The Procter & Gamble Company*, 932 F.2d 540 (6th Cir. 1991) ..... 15

*Babrocky v. Jewel Food Company and Retail Meatcutters Union, Local 320*, 773 F.2d 857 (7th Cir. 1985) ..... 9

*Baker v. Buckeye Cellulose Corporation*, 856 F.2d 167 (11th Cir. 1988) ..... 15

*Berkman v. City of New York*, 705 F.2d 584 (2d Cir. 1983) ..... 9

*Boston Chapter N.A.A.C.P. v. Beecher*, 504 F.2d 1017, 1021 (1st Cir. 1974) ..... 13

*Bouman v. Block*, 940 F.2d 1211 (9th Cir. 1991) ... *passim*

*Bronze Shields, Inc., v. New Jersey Department of Civil Service*, 667 F.2d 1074 (3d Cir. 1981), *cert. denied*, 458 U.S. 1122 (1982) ..... 5, 6

*Clady v. County of Los Angeles*, 770 F.2d 1421 (9th Cir. 1985), *cert. denied*, 475 U.S. 1109 (1986) ..... 12

*Contreras v. The City of Los Angeles*, 656 F.2d 1267 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982) .... 14

*Delaware State College v. Ricks*, 449 U.S. 250 (1980) ..... 5

*Easley v. Empire, Inc.*, 757 F.2d 923 (8th Cir. 1985) ..... 9

*Ellis v. Dixon*, 349 U.S. 458 (1955) ..... 7

*Equal Employment Opportunity Commission v. American Telephone & Telegraph Company*, 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978) ..... 9

TABLE OF AUTHORITIES – Continued

Page

*Ezell v. Mobile Housing Board*, 709 F.2d 1376, 1382 (11th Cir. 1983) ..... 13

*Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978) ..... 12

*General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175 (1938) ..... 10

*General Telephone Co. of The Southwest v. Falcon*, 457 U.S. 147 (1982) ..... 11

*Goodman v. Heublein, Inc.*, 645 F.2d 127 (2d Cir. 1981) ..... 15

*Guardian Association of New York City Police Department, Inc., v. Civil Service Commission of The City of New York*, 633 F.2d 232 (2d Cir. 1980), *aff'd*, 463 U.S. 582, *cert. denied*, 463 U.S. 1228 (1983) ..... 7

*Gupta v. East Texas State University*, 654 F.2d 411 (5th Cir. 1981) ..... 15

*International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) ..... 8

*J.I. Case Co. v. Borak*, 377 U.S. 426 (1964) ..... 10

*Jordan v. Wilson*, 649 F.Supp. 1038 (M.D. Ala. 1986), *rev'd in separate proceeding on different issue*, 851 F.2d 1290 (11th Cir. 1988) ..... 7

*Layne & Bowler Corporation v. Western Well Works, Inc.*, 261 U.S. 387 (1923) ..... 8

*Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 109 S.Ct. 2261 (1989) ..... 5, 6

*Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1176 (9th Cir. 1977) ..... 10

TABLE OF AUTHORITIES – Continued

Page

*National Labor Relations Board v. Pittsburgh Steamship Co.*, 340 U.S. 498 (1951) ..... 10, 14

*Oubichon v. North American Rockwell Corporation*, 482 F.2d 569 (9th Cir. 1973) ..... 14, 15

*Ramirez v. National Distillers & Chemical Corp.*, 586 F.2d 1315 (9th Cir. 1978) ..... 14

*Ratliff v. Governor's Highway Safety Program*, 791 F.2d 394 (5th Cir. 1986) ..... 8

*Ruggles v. California Polytechnic State University*, 797 F.2d 782 (9th Cir. 1986) ..... 15

*Southern Power Company v. North Carolina Public Service Company*, 263 U.S. 508 (1924) ..... 10

*Underwood v. District of Columbia Armory Board*, 816 F.2d 769 (D.C. Cir. 1987) ..... 8

*United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983) ..... 12, 13

*Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S.Ct. 2115 (1989) ..... 12, 13

OTHER:

Sup. Ct. R. 10 ..... 5

## RESPONDENTS' BRIEF IN OPPOSITION

Respondent Susan L. Bouman on behalf of herself and all others similarly situated respectfully submits that because of the detailed fact based findings of the district court the petition for a writ of certiorari received on October 22, 1991 should be denied and files this brief in opposition.

## OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 940 F.2d 1211 (9th Cir. 1991) and is partially reproduced in the Petitioners' Appendix (A-1 to A-65). Petitioners have failed to include the appendix to the court of appeals decision. Respondents have included the missing documents as Appendix A-1 to A-2 to this opposition.

The Opinion of the United States District Court is unreported in the official reports and is unofficially reported, *Bouman, et al. v. Pitchess, et al.*, 42 EPD 46,307 (C.D. Ca. 1985), *Bouman, et al. v. Pitchess, et al.*, 42 EPD 46,318 (C.D. Ca. 1987), *Bouman, et al. v. Pitchess, et al.*, 46 EPD 37,947 (C.D. Ca. 1988) and *Bouman, et al. v. Pitchess, et al.*, 47 EPD 53,226 (C.D. Ca. 1988). The Amended Memorandum After Trial is reproduced in the Petitioners' Appendix (B-1 to B-11).

## SUPPLEMENTAL STATEMENT OF THE CASE

Susan L. Bouman was hired by the County of Los Angeles as a Deputy Sheriff in 1971. *Bouman v. Block*, 940 F.2d 1211, 1217 (9th Cir. 1991). In 1974 she applied for a promotion to sergeant and took a three-part examination in 1975 to qualify for promotion. *Id.* at 1217.

From the examination score a promotion eligibility list was developed and used for two years. At the time the list expired on May 21, 1977, Bouman was at the top of the list and would have received the next appointment. From the list, four females and 127 males were promoted. Bouman was not promoted from this list. *Id.*

Prior to the list's expiration, Bouman inquired about her chances of appointment. Bouman testified that her superior "basically told her not to hold her breath." *Id.* Others in the department also knew that Bouman was not likely to be promoted. One deputy from another sheriff's station who was behind Bouman on the eligibility list called her because he heard that she was not going to be promoted and was concerned about how this would affect his promotion chances. *Id.*

The Employers'[1] own investigation concluded that there was strong evidence of sex discrimination on the examination and as regards the decision to not promote Bouman. After presentation of the investigative report,

---

[1] Petitioner Sherman Block is the elected sheriff of Petitioner Los Angeles County. John P. Knox was in charge of personnel matters for Petitioner Los Angeles County Sheriff's Department and a subordinate officer of the Sheriff. They are referred to herein collectively as "the Employer."

the investigator was ordered to prepare a false communication. Higher ranked officers denied the existence of the investigative report even after confronted with a copy during cross-examination, and the district court found such testimony "not credible."

Another sergeant examination was administered in 1977, but Bouman did not take it because she believed it would be futile and that the testing procedures discriminated against women.

Bouman brought several claims on behalf of herself and the class. For the class, she alleged that the sergeant examinations discriminated against women. She argued that the design of the 1975 examination was flawed. Bouman submitted statistical evidence showing that the examination had a statistically significant disparate impact on women. The Employer admitted that women deputies suffered adverse impact on the written portion of the 1975 examination, but argued that any differences in performance were not statistically significant and were explained by nondiscriminatory factors such as job experience. *Id.* at 1218. Bouman also contended that the Employer engaged in intentional discrimination against her and retaliated against her in connection with a request for transfer for filing a claim with the United States Equal Employment Opportunity Commission. *Id.* at 1218.

Bouman argued that job experiences in the Los Angeles County Sheriff's Department were not gained in a neutral fashion, citing the discriminatory assignments she and other female deputies endured. Bouman was not permitted to serve in a solo radio car at night in certain

areas because her supervisors felt it would be inappropriate. Meanwhile, male deputies were allowed to serve in such areas. The station commander also had a policy of having women deputies rotate on the station front desk. At one point, she was told to leave a radio car and work the station front desk. Men were not required to rotate on the front desk. *Id.*

The district court, after a twenty-two day trial with over fifty witnesses, found that the Employer engaged in intentional retaliatory discrimination against Bouman for filing her complaint with the EEOC. The district court also found that the Employer for years used discriminatory promotional examinations, which had a statistically significant disparate impact on women, and engaged in intentional discrimination against Bouman by failing to promote her to sergeant. The court of appeals found that substantial evidence supported those conclusions and the district court did not commit clear error. *Id.*

## REASONS WHY THE PETITION SHOULD BE DENIED

The Petitioners have presented three "categories" of complaint, labeled "standing," "adverse impact," and "retaliation." An examination of the Petitioners' current contentions amply reveals that the decision below was properly rendered with respect to each type of complaint. Moreover, in the absence of any special and important reasons for granting certiorari, conflict among courts or any other compelling reason warranting a grant of certiorari, this case does not merit this Court's review.

## SUMMARY OF ARGUMENT

This case presents no "special and important" reason warranting this Court's review. Sup. Ct. R. 10. It involves no conflict between the circuits, departure from the usual courses of proceedings, or any other reason to grant certiorari. The case involves nothing more than a heavily fact based decision which was proper on the merits. Moreover, the decision of the court below will have none of the asserted ill social effects, but might, admittedly, encourage employers to observe the dictates of the law.

## STANDING

The court of appeals properly held that the Respondent had standing to contest both the 1975 and the 1977 examinations. *Bouman v. Block*, 940 F.2d 1211, 1221-22 (9th Cir. 1991). The Petitioners' limitations claims regarding the 1975 exam are belied by the applicable case law and present no special or important issue for resolution by this Court.

In its decision below, the court analyzed the Petitioners' limitations argument by employing as the date of accrual of the claims the date of the expiration of the promotion eligibility list. *Id.* at 1221. The court considered, and properly distinguished, the holdings of the courts in *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 109 S.Ct. 2261 (1989); *Delaware State College v. Ricks*, 449 U.S. 250 (1980); and *Bronze Shields, Inc. v. New Jersey Department of Civil Service*, 667 F.2d 1074 (3d Cir. 1981),

*cert. denied*, 458 U.S. 1122 (1982); the termination or non-promotion in the latter cases "was a delayed but inevitable result of being denied tenure or not scoring well enough," *Bouman v. Block, supra*, 940 F.2d at 1221, while the Court in *Lorance* simply held that a claim of intentional discrimination in the *alteration* of contract rights accrued at the time of such alteration. *Lorance v. AT&T Technologies, Inc., supra*, 109 S.Ct. at 2265. In the instant case, by contrast, "not until the list expired was it certain that [Respondent] would not be promoted. She did not know until that date that she had suffered an injury." *Bouman v. Block, supra*, 940 F.2d at 1221. This factor distinguishes the instant case from the holdings relied upon by the Petitioners.

As described above, the different circumstances at issue in *Bronze Shields, Inc., v. New Jersey Department of Civil Service, supra*, 667 F.2d at 1074, rendered appropriate that court's use of the date of promulgation of an eligibility list for determining the timeliness of the charge. In that case, the plaintiffs had complained of the "defendants' refusal to *place them on* the hiring roster." *Id.* at 1083 (emphasis added). Thus, the Third Circuit reasoned that, as of the date of promulgation of the list, "plaintiffs knew they would not be hired by the . . . police department." *Id.* This reasoning is actually consistent with and supportive of that of the Ninth Circuit in the instant case; in the circumstances now under consideration, not until the list expired would the Respondent know she had not been promoted. *Bouman v. Block, supra*, 940 F.2d at 1221. Thus, the unlawful employment practice took place on that date and since her EEOC charge was filed within 300 days the action was timely filed. Until the Employer

intentionally allowed the list to expire, with her set to get the next appointment, Bouman could not know she had suffered an injury.

Courts of other jurisdictions which have had occasion to apply these principles to circumstances like those now at bar have reached the same conclusions as has the Ninth Circuit. *See, e.g., Guardian Association of New York City Police Department, Inc. v. Civil Service Commission of The City of New York*, 633 F.2d 232 (2d Cir. 1980), *aff'd*, 463 U.S. 582, *cert. denied*, 463 U.S. 1228 (1983); *Jordan v. Wilson*, 649 F.Supp. 1038 (M.D. Ala. 1986), *rev'd in separate proceeding on different issue*, 851 F.2d 1290 (11th Cir. 1988). Thus, the decision below is not only proper on the merits, but it is also supported by a consistent body of case law. There exists no conflict among courts of different jurisdictions nor any other special or important reason for this Court to grant certiorari on this issue.

Finally, the Respondent feels compelled to respond briefly to the Petitioners' characterization of the Respondent as a successful examinee who was harmed, not by the exam itself, but as a result of a failure to promote from the eligibility list. The Respondent was clearly not a successful applicant for a position she was not given. The contention that the administration of an exam, which results directly in the creation of an eligibility list, renders all ensuing harm the product of the list, and not of the exam, is a poor and nonsensical exercise in semantics. With respect to the Petitioners' suggestion that they are not parties properly held responsible for the processes here involved, that contention, not raised below, is not open for analysis here. *Ellis v. Dixon*, 349 U.S. 458, 460 (1966).

The Respondent respectfully suggests that no special or important issues have been raised meriting this Court's review. In fact, the tenor of certain of the Petitioners' fact-specific complaints clearly shows that this case falls within the rule that certiorari is to be granted only "in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties." *Layne & Bowler Corporation v. Western Well Works*, 261 U.S. 387, 393 (1923).

The Petitioners assert the vague and unsupported objection that the Respondent has challenged an examination – the 1977 exam – for which she did not apply. In its opinion below, the Ninth Circuit correctly followed the rule established by this Court, that "[a] plaintiff is not barred from bringing such an action where 'an application would have been a useless act serving only to confirm a discriminatee's knowledge that the job he wanted was unavailable to him.' " *Bouman v. Block, supra*, 940 F.2d at 1221 (quoting *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 367 (1977)). (The rationale behind this rule is explained, in part, by this Court's observation that "[t]he denial of Title VII relief on the ground that the claimant had not formally applied for the job could exclude from the Act's coverage the victims of the most entrenched forms of discrimination." *International Brotherhood of Teamsters v. United States, supra*, 431 U.S. at 367). The firm establishment of this rule by this Court has been followed by the recognition and application of the rule in circuit courts throughout the country. *See, e.g., Underwood v. District of Columbia Armory Board*, 816 F.2d 769, 775 (D.C. Cir. 1987); *Ratliff v. Governor's Highway Safety Program*, 791 F.2d 394, 402 (5th Cir. 1986);

*Babrocky v. Jewel Food Company, and Retail Meatcutters Union, Local 320*, 773 F.2d 857, 867 (7th Cir. 1985) ("Because an employer may create an atmosphere in which employees understand that their applying for certain positions is fruitless, even nonapplicants can in appropriate circumstances qualify for relief under Title VII"); *Easley v. Empire, Inc.*, 757 F.2d 923, 930 n.7 (8th Cir. 1985) ("formal application for a job will be excused when a known discriminatory policy . . . deters potential jobseekers"); *Berkman v. City of New York*, 705 F.2d 584, 594 (2d Cir. 1983) ("Those who have been deterred by a discriminatory practice from applying for employment are as much victims of discrimination as are actual applicants whom the practice has caused to be rejected"); *Equal Employment Opportunity Commission v. American Telephone & Telegraph Co.*, 556 F.2d 167, 180 (3d Cir. 1977), *cert denied*, 438 U.S. 915 (1978). The decision below clearly conforms with a well-established rule of law; there exists no conflict among the circuits or with this Court so as to justify a grant of certiorari.

The district court in this case did, in fact, conclude that the Respondent "had demonstrated that she would have applied for the 1977 list but for the futility of competing with discriminatory practices" (Amended Memorandum After Trial, Aug. 16, 1985, App. B-5). The Ninth Circuit properly applied the standard set out in *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564 (1985), to uphold the lower court's findings of fact and credibility determinations regarding this issue. (This Court has established that a "clearly erroneous" standard applies to review of factual findings and that "due regard shall be given to the opportunity of the trial court to

judge the credibility of the witnesses." *Id.* at 573.) The Petitioners' current claim is apparently directed at certain evidentiary rulings and weighing of the evidence conducted below; these complaints clearly present no "special or important" reason for this Court to grant certiorari in this case. This Court does not sit to review such matters. *National Labor Relations Board v. Pittsburgh Steamship Co.*, 340 U.S. 498, 503 (1951) ("This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other"); *see also J.I. Case Co. v. Borak*, 377 U.S. 426, 431 (1964) (the Court refused to engage in extended discussion of "questions of fact to be resolved at trial, not here"); *General Talking Pictures Corporation v. Western Electric Company*, 304 U.S. 175, 178 (1938) ("Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it"); *Southern Power Co. v. North Carolina Public Services Co.*, 263 U.S. 508, 509 (1924) (the Court stated that the presentation of questions regarding the sufficiency of the evidence "would not have moved us" to grant certiorari).

The Petitioners' challenges to the certification of the class are similarly specious. As was correctly recognized by the Ninth Circuit, "[t]he determination as to whether to certify a class is committed to the discretion of the district court and will not be disturbed on appeal absent a showing of abuse of discretion." *Bouman v. Block, supra*, 940 F.2d at 1232 (citing *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1176 (9th Cir. 1977)). Contrary to the Petitioners' claim that the lower court failed to engage in a

"rigorous examination" of Rule 23(a) factors, as recognized by the Ninth Circuit, these factors were ordered fully briefed by the court and carefully considered at a hearing. At the hearing, the judge "reviewed each of the elements required for a class under Rule 23(a) and stated briefly why each was satisfied." *Bouman v. Block, supra,* 940 F.2d at 1232. This analysis will demonstrate that the lower court did not engage in an "across the board" certification, but, rather, gave consideration to each element necessary to maintain a class action suit. This analysis included a demonstration of common issues, problems, and harms existing among class members. The court expressly found that the challenged practices had the same adverse effect on all class members. Since the case involved common discriminatory practices and all claims fell within the same category of legal theory the court properly certified the class. Cf. *General Telephone Co. of Southwest v. Falcon,* 457 U.S. 147, 159 (1982) (if *"one* allegation of specific discriminatory treatment were sufficient to support an across-the-board attack, every Title VII case would be a potential companywide class action"). The Petitioners' current claims are wholly without merit and do not warrant this Court's attention.

The above discussion demonstrates that the resolution of this case as decided below does not encourage litigation by persons without standing. The proper analysis of the standing issues, as engaged in by both courts below, reaffirms the fact that the courts will require the proper observance of the rules related to standing.

## ADVERSE IMPACT

The Petitioners' claims regarding the circuit court's findings of discrimination are without merit and do not warrant review by this Court.

The Petitioners' complaint regarding the standard of review is incorrect. As recognized in the opinion below, this Court has gone so far as to explain that "[w]here the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant." *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983). It is well settled that "[t]he prima facie case method . . . was 'never intended to be rigid, mechanized, or ritualistic.' " *Id.* at 715 (quoting *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978)). Thus, in its opinion below, the court properly stated that "[o]nce a Title VII case proceeds to judgment the issue is no longer whether plaintiff has established a *prima facie* case, but whether there was discrimination." *Bouman v. Block, supra*, 940 F.2d at 1223.

The opinion below acknowledges that the standard would differ had the trial court found an absence of a prima facie case. *Id.* The court's opinion is thus perfectly consistent with the case relied upon by the Petitioners, *Clady v. County of Los Angeles*, 770 F.2d 1421 (9th Cir. 1985), *cert. denied*, 475 U.S. 1109 (1986). The actions appealed from in *Clady* included the lower court's finding that no prima facie case had been established. *Id.* at 1426. Similarly, in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S.Ct. 2115 (1989), *only after* the trial court ruled against the plaintiffs did the circuit court hold that a

prima facie case had been made out. 109 S.Ct. at 2120. In *Atonio*, the Supreme Court itself did not specifically address the issue, which, as described above, had been settled in *Aikens*.

Contrary to the Petitioners' suggestion, the trial court did acknowledge that the federal guidelines (incorporating the "so-called 80 percent rule") are instructive, but not dispositive. *Bouman v. Block, supra*, 940 F.2d at 1225. The court noted that the question is whether the "statistical disparity is 'substantial' or 'significant' in a given case. *Id.* at 1225. The court concluded that both the adverse impact of the examinations and the bottom-line adverse impact were statistically significant and proven by "several generally accepted techniques." *Id.* at 1225. Moreover, as noted in the opinion below, courts do look at trends from past examinations to assess evidence of discrimination with respect to a total pass rate. *Id.* at 1226 (citing *Ezell v. Mobile Housing Board*, 709 F.2d 1376, 1382 (11th Cir. 1983); *Boston Chapter NAACP v. Beecher*, 504 F.2d 1017, 1021 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975)). The court's combination of the 1975 and 1977 results is thus proper.

With respect to the asserted "insubstantial differences" in the statistics, the Petitioners' argument comes perilously close to misleading. The court assessed the expert evaluations and concluded that they showed statistical significance. *Bouman v. Block, supra*, 940 F.2d at 1226. Importantly, the court rejected the Petitioners' interpretation of prior Ninth Circuit authority; it held both that the combination of small sample size and small success rate calls into question the significance of an 80% rule violation and that a showing of significance at the .05

level distinguishes the instant case from *Contreras v. The City of Los Angeles*, 656 F.2d 1267 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982). The Petitioners' current attempt to foist upon this court their own interpretation of Ninth Circuit authority which has been rejected by that circuit well merits this Court's refusal to take up this case.

Finally, the Petitioners have failed to observe that the Ninth Circuit's rejection of this contention by the Petitioners is based, in part, on the trial court's crediting the Respondent's experts with respect to a possible correlation between disparate performance and experience. *Bouman v. Block, supra*, 940 F.2d at 1227. The lower court's factual findings are entitled to deference and constitute no proper basis upon which to seek certiorari. *Anderson v. City of Bessemer City North Carolina, supra*, 470 U.S. at 573; *National Labor Relations Board v. Pittsburgh Steamship Co., supra*, 340 U.S. at 503.

## RETALIATION

The Petitioners' argument concerning retaliation completely ignores the governing precedent firmly established in the Ninth Circuit and relied upon in the decision below. Based upon the principles set out in *Ramirez v. National Distillers & Chemical Corp.*, 586 F.2d 1315 (9th Cir. 1978), and *Oubichon v. North American Rockwell Corp.*, 482 F.2d 569 (9th Cir. 1973), the court below held that the Respondent's retaliation claim of March 1978 was "reasonably related" to her prior filed discrimination claim of January 1978 and rejected the contention that a separate

retaliation charge should have been filed with the EEOC. *Bouman v. Block, supra,* 940 F.2d at 1229. In so concluding, the court followed its own precedent, which dictates that "[w]hen an employee seeks judicial relief for incidents not listed in his original charge to the EEOC, the judicial complaint nevertheless may encompass any discrimination like or reasonably related to the allegations of the EEOC charge, including new acts occurring during the pendency of the charges before the EEOC." *Oubichon v. North American Rockwell Corp., supra,* 482 F.2d at 571. The decision below is also consistent with the conclusions of other circuit courts which have had occasion to state that retaliation claims such as those involved in the instant case need not be the subjects of separate EEOC filings. *See, e.g., Ang v. The Procter & Gamble Co.,* 932 F.2d 540, 546-47 (6th Cir. 1991); *Baker v. Buckeye Cellulose Corporation,* 856 F.2d 167, 168-69 (11th Cir. 1988); *Gupta v. East Texas State University,* 654 F.2d 411, 413-14 (5th Cir. 1981); *Goodman v. Heublein, Inc.,* 645 F.2d 127, 131 (2d Cir. 1980). There is no conflict among the circuits regarding this issue; a grant of certiorari is not warranted.

Finally, it should be noted that the decision of the court in *Ruggles v. California Polytechnic State University,* 797 F.2d 782 (9th Cir. 1986), merely discusses the nature of a retaliation claim; it does not address the issue at hand (which issue has, as discussed above, been addressed elsewhere by the Ninth and other circuits). The *Ruggles* decision is thus inapposite; it in no way affects an analysis of the merits of the question and provides no conflicting counterprinciple which might warrant the Court's consideration.

## CONCLUSION

Since the court of appeals correctly applied the law, there is no issue of national importance worthy of the attention of this Court, and the decision below turns on its own facts, and, as a precedent, will affect relatively few other litigants, the petition for writ of certiorari should be denied.

DATED: November 15, 1991

Respectfully submitted,

DENNIS MICHAEL HARLEY

*Counsel for Respondents*

**APPENDIX "A"**

COMPUTER COUNTS OF LOS ANGELES COUNTY SERGEANT AND DETECTIVE SERGEANTS SELECTION PROCESS[b]

| YEAR | STEP | ISSUE | STANDARD DEVIATIONS | PROBABILITY | ONE CHANCE IN | CASE |
|---|---|---|---|---|---|---|
| 1975 | Available vs. Applied (H) | Discouragement & Experience Requirements | 4.61 | .000004 | 242,671 | 48 |
| 1975 | Available vs. Applied (G) | Discouragement & Experience Requirements | 5.73 | .00000001 | 99,000,000 | 49 |
| 1975 | Applied vs. Took Written | Discouragement | 2.43 | .015113 | 66 | 50 |
| 1977 | Available vs. Applied (H) | Discouragement & Experience Requirements | 5.08 | .00000037 | 2,700,000 | 60 |
| 1977 | Available vs. Applied (G) | Discouragement & Experience Requirements | 6.52 | .000000000068 | 14,000,000,000 | 61 |
| 1975 | Took Written vs. Passed | Passing Written | 2.29 | .0121773 | 46 | 51 |
| 1975-77 | Applied* vs. Took Written | Discouragement | 2.83 | .004618 | 217 | 76 |
| 1975-77 | Took Written* vs. Passed Written and Made AP | Passing of Written | 3.07 | .002147 | 466 | 77 |
| 1975-77 | Took Written* vs. Passed Written & Passed AP & Took Oral | Passing Two Cutoffs (Written & AP) | 2.23 | .025963 | 39 | 97 |
| 1975 | Available vs. Promoted | Bottom Line | 2.70 | .006995 | 143 | 58 |
| 1977 | Available vs. Promoted | Bottom Line | 2.05 | .040251 | 25 | 71 |
| 1975 - 1977 Counting Candidates only once | | | | | | |
| | Applied vs. Promoted | Bottom Line | 2.31 | .020649 | 48 | 89 |
| | In Pool vs. Applied | Discouragement & Experience Requirements | 6.24 | .00000000042 | 2,300,000,000 | 90 |
| | Applied vs. Took 1 Written | Discouragement | 2.93 | .003363 | 297 | 91 |
| | Took 1 Written vs. Passed 1 Written | Passing Written | 3.26 | .001100 | 909 | 92 |
| | Took Written vs. Passed Both Written & AP Cutoffs | Pass 2 Cutoffs | 2.44 | .014603 | 68 | 96 |

*and not promoted early

REVISED 4/15/86

**APPENDIX "B"**
**ADVERSE IMPACT SUMMARY**

| SELECTION PROCESS STEPS | | A 1975 M | A 1975 F | A 1975 T | | B 1977 M | B 1977 F | B 1977 T | | C[a] 1975 ADDED to 1977 M | C[a] 1975 ADDED to 1977 F | C[a] 1975 ADDED to 1977 T | D 1975 or 1977 M | D 1975 or 1977 F | D 1975 or 1977 T |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Deputy I, II, III, IV | (1974) | 3479 | 364 | 3843[d] | (1976) | 3596 | 477 | 4073[e] | (1975) | 3619 | 415 | 4034[f] | – | – | – |
| Applied | | 1506 | 101 | 1607 | | 1628 | 141 | 1769 | | 3134 | 242 | 3376 | 2159 | 190 | 2349 |
| Did Not Promote Early | | – | – | – | | 1616 | 141 | 1757[e] | | 3122 | 242 | 3364 | – | – | – |
| Took Written Test | | 1312 | 79 | 1391 | | 1259 | 102 | 1361 | | 2571 | 101 | 2752 | 1826 | 145 | 1971 |
| Took written Test Not Promoted Early | | – | – | – | | 1254 | 102 | 1356 | | 2566 | 101 | 2747 | | | |
| Passed Cutoff for Written Test (70% 1975) (70% 1977) | | 491 | 19 | 510 | | 562 | 34 | 596 | | 1053 | 53 | 1106 | 849 | 48 | 897 |
| Passed Cutoff for Written and Not Promoted Early | | – | – | – | | 558 | 34 | 592 | | 1049 | 53 | 1102 | | | |
| Appraisal of Promotability Made (AP) | | 487 | 19 | 506 | | 558 | 34 | 592 | | 1045 | 53 | 1098 | 846 | 48 | 894 |
| Passed Cutoff of AP and Written (53.78 1975) (53.75 1977) | | 250 | 10 | 260 | | 331 | 18 | 349 | | 581 | 28 | 609 | 502 | 24 | 526 |
| Took Oral Interview | | 250 | 10 | 260 | | 329 | 18 | 347 | | 579 | 28 | 607 | 513 | 28 | 541 |
| Placed on Eligible List | | 249 | 10 | 259 | | 331[f] | 18 | 349 | | 580 | 28 | 608 | 514 | 28 | 542 |
| Promoted | | 127 | 4 | 131 | | 93 | 5 | 98 | | 220 | 9 | 229 | 220 | 9 | 229 |

Notes: See attached.